
APPELLATE COURT
OF THE
STATE OF CONNECTICUT

A.C. 42493

JUDITH KISSEL

v.

CENTER FOR WOMEN'S HEALTH, P.C., ET AL.

BRIEF OF DEFENDANT-APPELLANT
CENTER FOR WOMEN'S HEALTH, P.C.
WITH SEPARATELY BOUND APPENDIX PART ONE AND PART TWO

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STATEMENT OF ISSUES

- I. Was the trial court required to dismiss the complaint where the plaintiff failed to comply with Conn. Gen. Stat. § 52-190a by omitting a good faith opinion letter from a similar health care provider when she filed her action and where the plaintiff did not amend the pleadings before the statute of limitations lapsed?
- II. Was the trial court required to grant Defendant's request for an evidentiary hearing on their motion to dismiss to resolve Plaintiff's factual claims, which were in dispute?
- III. Was the trial court required to grant the Defendant's motion for directed verdict and/ or motion to set aside the verdict where the evidence presented at trial was insufficient to prove that Reed Wang, L.Ac.'s purported breach of the standard of care was the proximate cause of Plaintiff's injuries, which allowed the jury to improperly speculate on the issue of causation?
- IV. Did the trial court erroneously instruct the jury that expert testimony was not required to establish causation under the circumstances of this medical malpractice case?

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I. Statement of Facts

The plaintiff/appellee, Judith Kissel, initiated this medical malpractice action by way of complaint dated March 30, 2012. Her complaint alleged that Reed Wang, L.Ac. ("Dr. Wang"), a licensed acupuncturist, utilized a heat lamp during an acupuncture treatment. On April 22, 2010, while she was undergoing the acupuncture treatment, the lamp came into contact with her left foot and toe causing her to suffer burns to those parts of her body. She was the only person in the room during the treatment and did not see how the lamp came into contact with her foot. She alleged in her complaint that Dr. Wang was an agent of the defendant/appellant Center for Women's Health P.C. (The Center) at the time this treatment took place. A1.

Subsequent to the initiation of the medical negligence suit, Dr. Wang through his counsel sought to implead the manufacturer of the heat lamp, the defendant/appellant Health Body Works Supply a/k/a WABBO (WABBO) based on claims that it had manufactured a defective product. Thereafter, the plaintiff also plead claims against WABBO sounding in products liability. WABBO specially plead contribution as to all parties. Dr. Wang claimed that the plaintiff was contributory negligent.

This case was tried to a jury in November and December of 2017. At the conclusion of the plaintiff's case in chief, all of the defendants moved for directed verdicts. The trial court heard argument and reserved judgment on the motions. After the defendants' cases were concluded and a charge conference was held, closing arguments were presented and the trial court charged the jury. Given the unusual nature of the case with two legal theories being presented, multiple verdict forms were provided to the jury along with jury interrogatories. A293. The jury ultimately filled out two plaintiff's verdict forms. A300. The

first found Dr. Wang and the Center liable with a finding to \$1,000,000 in damages. The plaintiff was not found to be contributory negligent. The second verdict form found WABBO liable, but additionally found that Dr. Wang was 20% responsible for contribution. The plaintiff was found to have no contribution. The damages found on the second verdict form were also \$1,000,000. Based on the jury interrogatories and the charge to the jury, it was understood that the jury was to make a single damage award that would be included on each verdict form. The court assured the jury that there would not be a double recovery of that award. As a result, the total jury award for all of the plaintiff's damages, despite being included on two separate verdict forms, was determined to be \$1,000,000.

Since much of this appeal focuses on the testimony presented at trial it is important to set forth the witnesses and the nature of their testimony. In the medical negligence case against Dr. Wang and the Center, the plaintiff presented one standard of care witness, Simone Wan Moran, a licensed acupuncturist. Her testimony was that Dr. Wang failed to meet the standard of care because he failed to inspect the lamp between patients that day. Trial Tr. Dec. 12, 2017. The plaintiff also called Dr. Wang to testify in her case. She presented one engineering expert, Victor Popp, P.E. His testimony was presented to support the plaintiff's claim that the heat lamp was defectively designed because it lacked a guard and/or a locking mechanism to keep it in place. He found as part of his testing that the lamp did not drop or lower on its own, but only if a substantial force was applied to it, something in the magnitude of 1.4 lbs. Trial Tr. Dec. 1, 2017. The plaintiff also called Sami Wu, one of the owners of WABBO, to testify about WABBO's business and the nature of the heat lamps that it imported and sold. In addition, the plaintiff called a doctor who had

treated her burn injuries, as well as one of her co-workers. Lastly, the plaintiff testified as to the incident and her damages.

Dr. Wang and the Center called an acupuncture expert, Dr. Leslie Brett. Dr. Brett supported Dr. Wang's care and testified that his use of the lamp met the standard of care. WABBO called an engineer, Glenn Vallee, Ph.D., P.E. His testimony was that the lamp was not defective and did not exhibit any indication that it would spontaneously or unexpectedly lower.

II. Argument

A. The Trial Court Erred In Failing To Dismiss the Plaintiff's Complaint

1. Standard of Review

The standard of review as to the trial court's ultimate legal conclusion and resulting determination as to a motion to dismiss is a de novo standard of review. Bennett v. New Milford Hospital, 300 Conn. 1, 11 (2011).

2. Procedural History

On May 24, 2012 the Center filed a motion to dismiss the plaintiff's medical malpractice complaint because the plaintiff had failed to attach to her complaint an opinion letter as mandated by the provisions of Conn. Gen Stat. Sec. 52-190a. (See, Court Docket #105)¹ A9. The motion asserted that that plaintiff had brought a medical negligence case, as opposed to one sounding in general negligence, and therefore she was required to attach an opinion letter to comply with the terms of Conn. Gen. Stat Sec. 52-190a. Because no letter was attached, the court lacked personal jurisdiction over the defendant

¹ All references to “#” are to the court docket numbers of the document which support this factual statement.

based on the express language of Morgan v. Hartford Hospital, 301 Conn. 388 (2011) which provided, in no uncertain terms, that an opinion letter was a statutory prerequisite to filing a malpractice action and that the failure to attach such a letter to the complaint constituted insufficient service of process requiring dismissal due to lack of personal jurisdiction. Morgan at 401.

On June 28, 2012 the plaintiff filed an opposition memorandum to the motion to dismiss. (#113) A74. The plaintiff acknowledged that no opinion letter had been attached to the complaint. She included with her opposition an attorney affidavit to which was attached a letter that she claimed complied with Conn. Gen. Stat. Sec. 52-190a. The affidavit was signed by Attorney Sean McElligott. He averred in the affidavit that he had consulted with an acupuncturist beginning on November 16, 2011. Further, that between November 16, 2011 and February 16, 2012, the acupuncturist that he had consulted reviewed various medical records. That the good faith opinion letter attached to the affidavit was signed and sent the attachment by e-mail to his legal assistant, Lindsey Hanson, on February 19, 2012, before suit was instituted. He further averred that the letter from the expert had been inadvertently left off of the complaint when he signed it on March 30, 2012.

The documents referenced in the affidavit were attached to it as exhibits. Exhibit 1 was a letter, on Koskoff, Koskoff & Bieder stationary, with the date of November 16, 2011 typed at the top. The name and address of the person that this letter was being sent to was redacted. The content of the letter indicated that various documents and information had been sent to the recipient for review. The author of the letter was Evelyn McGrath, RN/Paralegal. She requested that the person to whom the letter was written contact

Attorney Joel Lichtenstein to discuss the case upon completion of his or her review. Exhibit 2 was an undated, typed document titled: "Opinion Pursuant to C.G.S. Section 52-190a". The document was addressed to "Mr. Lichtenstein" and contained no visible signature or signature line. Exhibit 3 was an email with the name "Lindsey Hanson" at the top. There was no name in the "From" line. The "To" line named Lindsey Hanson as the recipient. The "Subject" was "Re: Opinion letter – Kissel". There were attachments identified as "Acudoc.PDF" and "ATT00001.htm". The body reads: "I scanned it and attached it for you. Please let me know if you still need a hard copy. Thanks,".

In her opposition memorandum the plaintiff asserted that the undated letter existed at the time suit was brought, but that it was inadvertently not attached to the complaint. A74. Based on this, she argued that *dicta* from Votre v. County Obstetrics and Gynecology, 113 Conn. App. 569 (2009) permitted her to avoid dismissal and proceed because there had been a mistake by counsel.

In addition to the opposition memorandum and affidavit, the plaintiff also filed a request to amend her complaint. A50. The stated purpose of the amendment was to attach a "written and signed opinion of a similar health care provider in order to comply with (52-190a)". The amended complaint was attached to the request for leave to amend as Ex. A. The same affidavit and exhibits described above were attached as Ex. B.

The Center filed a reply to the plaintiff's Opposition to the Motion to Dismiss, as well as an Objection to the Request to Amend. A159, A120. In both pleadings the defendant challenged the factual assertions made in the affidavit. The defendant requested an evidentiary hearing be held so that the trial court could make determinations as to key contested facts such as the date of the letter and whether it was in existence prior to the

commencement of the complaint. The defendant also argued that, with respect to the requested amendment to the complaint, that the court had to address the merits of the defendant's motion to dismiss the original complaint before taking up whether an amendment would be permitted.

The plaintiff replied to the Objection to the Request for Leave to Amend claiming that the trial court had the authority to permit an amendment to correct a defect or missing letter based on Votre. A199. She also challenged the defendant's request for an evidentiary hearing claiming that the affidavit concerning Attorney McElligott's personal knowledge was not in dispute because the defendant had not "created an issue of fact" with a responsive affidavit. A199.

On September 6, 2012 the court (Karazin, J.) issued a memorandum of decision denying the defendants' Motion to Dismiss and overruling its objection to the request to amend the complaint.² A12. While the court recognized the holding from Morgan that the lack of an opinion letter deprived the court of personal jurisdiction, it nonetheless analyzed whether under Votre such an omission could be corrected if the letter existed before suit was brought. A12. It concluded, based on the affidavit, that the letter existed before suit was filed. The court also rejected the defendant's argument that an evidentiary hearing was needed to address the contested factual issues raised by the undated, unsigned exhibits attached to the affidavit. A12. It concluded that it could simply accept them as true. It stated, "In the absence of counter-evidence by the defendant, the court finds the written opinion letter existed prior to the commencement of the action and the attorney's

² The ruling applied both to The Center's motion (#105) and Wang's motion (#106). Wang joined The Center and also sought dismissal on the same grounds.

failure to attach it to the original complaint was inadvertence or an oversight.”³ Decision at page 11. A12. The defendant thereafter sought re-argument pointing out that the law set forth in Morgan required dismissal because there was no personal jurisdiction over the defendant. A216. Without personal jurisdiction, the only judgment that could be obtained was a void judgment. The motion also stressed that since this was a medical malpractice action, that there would be a significant waste of resources to proceed where the outcome of any future judgment would be void. That motion was denied. A224.

After the verdict, The Center joined Dr. Wang’s motion seeking re-argument of the issue of dismissal based on Peters v. United Community and Family Services, Inc., 182 Conn. App. 688 (2018) which held that any attempt to amend to correct a problem with the required 52-190a opinion letter had to be undertaken either within 30 days of the return date, when amendments as of right are permitted, or within the statute of limitations. AA394. Peters also characterized the Votre decision’s commentary on the permissibility of amendments to cure a defective letter as *dicta*. In its ruling on the post-trial motions the trial court granted the defendants’ motion to reargue, but it denied the defendants any relief. A431.

3. The Trial Court Erred When It Failed to Grant The Center’s Motion to Dismiss

Connecticut Gen. Stat. § 52-190a(c) provides that “[T]he failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action.”

³ Every element of contacting the expert and obtaining the opinion was solely within plaintiff’s counsel’s possession and control. Aside from raising doubt as to the veracity of the assertions, given that key information was missing from or redacted from the documents relative to dates and the identities of the authors/recipients of the documents, the defendant had no independent ability to provide counter-evidence relative to the manner in which plaintiff’s counsel went about attempting to secure an opinion letter.

The Supreme Court made clear in Morgan that, “(T)he attachment of the written opinion letter of a similar health care provider is a statutory prerequisite to filing an action for medical malpractice. The failure to provide a written opinion letter, or the attachment of a written opinion letter that does not comply with § 52-190a, constitutes insufficient process and, thus, service of that insufficient process does not subject the defendant to the jurisdiction of the court.” Morgan at 401.

At the time the Center’s motion was heard it was undisputed that: 1) this was a medical negligence case and 2) that the plaintiff had failed to attach an opinion letter to the complaint. As a result, based on express language of Morgan, there was insufficient process since a statutory prerequisite for filing and pursuing a medical malpractice action had not been met.

Because there was no personal jurisdiction over the Center, the defendant’s Motion to Dismiss should have been granted. The trial court’s failure to do so either at the time the motion was originally filed, or when the trial court granted re-argument and reconsidered the issue without dismissing the case, was error.

B. The Trial Court Erred In Permitting the Plaintiff to File a Curative Amendment After the Statute of Limitations Had Run

1. Standard of Review

The standard of review regarding the amendments to complaints is whether the trial court abused its discretion. However, the appellate court has provided additional guidance as to when it will be considered an abuse of discretion to either permit or deny the amendment of a complaint where the amendment seeks to correct a defective opinion letter. In Peters v. United Community & Family Services, 182 Conn. App. 688 (2018), the court made clear that, “Regardless of the type of procedure a plaintiff elects to employ to

cure a defect in an opinion letter filed in accordance with Conn. Gen. Stat. Sec. 52-190a, that procedure must be initiated prior to the running of the statute of limitations. Otherwise the sole remedy available will be to initiate a new action, if possible, pursuant to Conn. Gen. Stat. Sec. 52-592.” Peters at 706.

Based the foregoing, while the standard of review remains abuse of discretion, there is a clear, but limited, time within which a court can exercise its discretion and that has been judicially determined to be prior to the expiration of the statute of limitations.

2. The Trial Court Erred In Permitting An Amendment To The Complaint Because It Lacked A Legal Basis To Do So

It is undisputed that the plaintiff failed to file and serve an opinion letter with her complaint. As a result, the court never obtained personal jurisdiction over the defendant. “Unless service of process is made as the statute prescribes, the court to which it is returnable does not acquire jurisdiction . . .” Morgan at 402-403.

Thus, this case departs from the language of many of the decisions which address amendments to inadequate opinion letters. The plaintiff here was not attempting to amend a deficient letter after the statute of limitations had run; she was attempting to attach a letter to her complaint.⁴ It was improper for the trial court to permit the plaintiff to amend her complaint to add a letter. This amounted to subjecting the defendant to personal jurisdiction even though a statutory pre-requisite required for proper service of a medical malpractice complaint had not been met.

In New England Road, Inc. v. Planning & Zoning Comm'n of Clinton, 308 Conn. 180, 61 A.3d 505 (2013), the Supreme Court reaffirmed the long-standing rule from Hillman v.

⁴ The defendant never even reached the point where it could address the substance of the letter because its motion to dismiss was directed solely to the only issue known to it at the time, which was that no letter at all was attached to the original complaint.

Greenwich, 217 Conn. 520 (1991) and Village Creek Homeowners Association v. Public Utilities Commission, 148 Conn 336 (1961) that the failure to serve a complaint with the necessary documents deprives the court of personal jurisdiction and that such a failure is not subject to correction by amendment. In Hillman the complaint lacked a writ of summons. In Village Creek there was no citation as required by Conn. Gen. Stat. § 16-37 for an appeal of an order of the public utilities commission.

As this court stated in Hillman, "a writ of summons is a statutory prerequisite to the commencement of a civil action. . . . [I]t is an essential element to the validity of the jurisdiction of the court." (Citations omitted.) Hillman v. Greenwich, supra, 217 Conn. 526;

New England Road, Inc. v. Planning & Zoning Comm'n of Clinton, 308 Conn. 180, 192 (2013).

In all of these cases, Hillman, Village Creek and New England Road, Inc., the defect was not permitted to be corrected by way of amendment.

In Morgan the Supreme Court cited Hillman and its determination that a writ of summons is a statutory prerequisite to initiating suit and obtaining valid jurisdiction. The Morgan court then went on to hold:

Likewise, the attachment of the written opinion letter of a similar health care provider is a statutory prerequisite to filing an action for medical malpractice. The failure to provide a written opinion letter, or the attachment of a written opinion letter that does not comply with § 52-190a, constitutes insufficient process and, thus, service of that insufficient process does not subject the defendant to the jurisdiction of the court.

Morgan v. Hartford Hosp., 301 Conn. 388, 401, 459 (2011).

The plaintiff here failed to comply with a statutory prerequisite for instituting this medical malpractice action. Her failure to attach an opinion letter the complaint has the same effect as failing to file an action with a writ of summons, the defendant is not subject to the jurisdiction of the court due to that failure. Here the trial court had no personal

jurisdiction over the defendant and, since that issue was raised by a timely motion to dismiss, that should have been fatal to this action. In Hillman the plaintiff attempted to use the curative statute Conn. Gen. Stat. § 52-72 to permit an amendment. The Hillman court rejected that attempt finding that the statute did not apply.

While the Supreme Court in Morgan cited Hillman for the proposition that the mandatory requirements for process have to be met for the court to have jurisdiction over the person, in Gonzales v. Langdon, 161 Conn. App. 497 (2015), an opinion letter case, the appellate court attempted to distinguish New England Road. But the considerations raised do not apply here. In Gonzales the defendant relied on New England Road to argue, similar to the argument being made here, that where there is a substantive defect in process due to an insufficient opinion letter, a plaintiff may not amend such a defect in process since in New England Road the Supreme Court reaffirmed the long standing rule that only technical defects, such as an incorrect return date or late return of process may be amended under Conn. Gen. Stat. § 52-72.

The Gonzales court looked to distinguish New England Road by looking to two issues: 1) that New England Road was not a malpractice case, but rather a zoning appeal, which requires strict adherence with process requirements; and 2) that in New England Road and the cases cited therein, the plaintiffs had “failed to comply in any fashion” with one or more of the due process requirements whereas in Gonzales the plaintiff had made a good faith effort to attach an opinion letter to her complaint. Gonzales at 514.

As to the first issue, the plaintiff here like the plaintiffs in New England Road and the cases it relied on failed to adhere to an express requirement for jurisdiction. She failed to attach an opinion letter to her medical malpractice complaint. The Morgan court goes on at

length to describe how this is a requirement that must be met to confer jurisdiction. The opinion letter is called a “mandatory attachment”. It is said to serve as a “precondition for the effective service of process” in order to start a malpractice action. The failure to attach it constitutes insufficient service of process and does not subject the defendant to jurisdiction of the court. “Process” includes the summons complaint and any attachments thereto. There is nothing in Morgan that suggests that the seriousness of meeting the obligation to prepare a complaint in a medical malpractice case that complies with statutory obligations imposed by Conn. Gen. Stat. § 52-190a is any less stringent than that required when taking a zoning appeal. There is really nothing to distinguish between the act of inadvertently leaving a summons off of a zoning appeal, thus subjecting it to dismissal, from inadvertently leaving an opinion letter off of a malpractice complaint, thus subjecting it to dismissal. The care and diligence undertaken by counsel in either case should be identical.

The second basis used by the Gonzales court to distinguish New England Road also does not apply in this case, as there was no good faith attempt to attach a letter that complied with the statute. It is undisputed that the plaintiff failed to attach an opinion letter to the complaint. This is no different than the plaintiff in New England Road who failed to attach a summons. The rationale behind the failure does not matter. The court should not be engaged in assessing whether a case should be dismissed due to inadvertence or a simple failure to understand the rule. The end result is the same, defective process does not confer jurisdiction over the defendant.

Unlike the plaintiff in New England Road who looked to Conn. Gen. Stat. § 52-72 as a basis to amend defective process, the plaintiff here presented no statutory basis that would permit the court to allow an amendment to correct the defect in process of the

missing letter. The plaintiff's fallback position of relying on *dicta* from Votre is unavailing. First, the recognition in Votre of the fallibility of counsel is *dicta* as the Votre court's decision had nothing to do with an attempt to amend. Second, despite recognizing the fallibility of counsel, the Votre court made no determination that personal jurisdiction could be conferred by taking the steps needed to meet the statutory prerequisite for jurisdiction, after a suit had been filed. That would run counter to both Morgan, which found attaching a letter to be a statutory prerequisite and also to some extent New England Road, which followed the line of cases holding that failing to attach a required document is a substantive defect, that cannot be corrected by amendment and refile under Conn. Gen. Stat. § 52-72. Lastly, if the *dicta* in Votre recognizing the fallibility of counsel were applicable to a missing opinion letter, then a similar notion should have also been recognized in New England Road where counsel left off a summons. Instead, it was determined that the rules for process must be strictly adhered to and that an amendment will not be permitted in order to avoid dismissal.

Because there was no legal basis to permit an amendment, the trial court should have denied the plaintiff's request for leave to amend her complaint to add an opinion letter and granted the motion to dismiss.

3. The Trial Court Erred By Allowing An Amendment to the Complaint Because The Statute of Limitations Had Lapsed

The trial court improperly permitted the plaintiff to amend her complaint to add an opinion letter after the statute of limitations had expired.

Peters v. United Community and Family Services, Inc. makes clear that any attempt by a plaintiff to cure a defect in an opinion letter must be undertaken before the statute of

limitations has lapsed. Peters at 706. Where the plaintiff fails to take such action before the statute of limitations has run, the case must be dismissed.

This case concerned a single acupuncture treatment that took place on April 22, 2010. On June 28, 2012, more than two years after the incident and more than 30 days after the return date, the plaintiff sought to amend her complaint to add an opinion letter. (# 112). Because the plaintiff's attempt was made after the statute of limitations had run, it should not have been permitted by the trial court. Instead, the complaint should have been dismissed as the process served upon the defendant lacked a necessary statutory prerequisite, an appropriate opinion letter signed by a similar health care provider.

C. The Trial Court Erred in Denying the Defendant an Evidentiary Hearing on The Motion to Dismiss

1. Standard of Review

In reviewing a ruling on a motion to dismiss, a plenary standard of review applies. Peters at 705.

2. Where There Are Issues of Fact On a Motion to Dismiss an Evidentiary Hearing is Required

The trial court erred when it deprived the defendant of a hearing relative to the disputed facts raised by the plaintiff in opposing the Motion to Dismiss.

As the defendant addressed in its reply brief to the plaintiff's opposition to the motion to dismiss, there were multiple reasons to question the timing and the authorship of the opinion letter that the plaintiff belatedly sought to attach to the complaint. A159. First, the letter was not attached to the original complaint which would be expected, particularly in a suit brought by experienced medical malpractice attorneys. Second, the letter was undated

and the version presented was unsigned.⁵ Those factors alone raised doubt as to when this letter had been drafted and signed before the complaint had been filed. In an effort to cure those deficiencies, the plaintiff through counsel attempted to put evidence before the court, by way of an attorney affidavit, to try to make a showing that this letter had been drafted and signed before suit had been instituted. The attorney affidavit, however, raised additional issues of fact that were open to being contested at a hearing. The e-mails attached to the attorney affidavit had redactions raising questions as to who the participants in the exchange were. There were multiple people involved in the various writings including Evelyn McGrath a nurse paralegal, Lindsey Hanson described as Attorney McElligott's assistant and Joel Lichtenstein, an attorney who was referred to in Ms. McGrath's letter as the person to contact following the review and also the person to whom the undated, unsigned letter was sent. Despite the involvement of these various individuals, as well as perhaps the letter writer, the only affidavit attached was from Attorney Sean McElligott. Even though his name did not appear in the other writings, he avers that he consulted with the expert in order to obtain the good faith letter, and that he inadvertently failed to attach it to the complaint. All of the information concerning the efforts to retain the expert predate defense counsel's involvement in the case and was solely in plaintiff's counsel's control. The defendant's opportunity to address these key issues, which formed the basis for the trial court's ruling that the letter was in existence when suit was brought, was lost when it was denied an evidentiary hearing.

⁵ While the statute allows for the filing of opinion letters with the author's name redacted, there is nothing that required the redaction of the name in this context. So the fact that the letter was presented to the court unsigned raised issues as to its validity.

In Caron v. Conn. Pathology Group, 187 Conn. App. 555 (2019), the appellate court addressed a motion to dismiss based on a claim that the wrong type of expert had been retained to provide an opinion letter. In Caron the court stated, “We caution, however, that when courts are faced with genuine factual disputes in deciding motions to dismiss, an evidentiary hearing is required. See, e.g., Conboy v. State, 292 Conn. 642, 652–54, 974 A.2d 669 (2009) (“where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts”).” Caron at 563, fn. 6. Here, the defendant requested an evidentiary hearing on the key jurisdictional determination of whether the letter existed at that time the complaint was brought. While it is the defendant’s position that the plaintiff was not permitted to amend the complaint at all based on Peters, and a general lack of authority to permit an amendment to process, to the extent the trial court was considering this issue as a basis to deny the Motion to Dismiss, it had to allow the defendant an opportunity to challenge the evidence that the plaintiff was coming forward with at an evidentiary hearing. In its Reply to the Plaintiff’s Objection to its Motion to Dismiss (#115), the Center sought an evidentiary hearing to address the facts that it wished to contest in the attorney affidavit and the other redacted and undated material submitted in opposition to the Motion to Dismiss. The defendant made clear that it wished to contest the issue of whether the letter was in existence at the time the complaint was filed. The trial court rejected the defendant’s request for a hearing and accepted plaintiff’s counsel’s representations as true. (Decision at page 10) A12. The facts concerning how the opinion letter was obtained were exclusively within the possession of the plaintiff’s lawyers and their unidentified expert reviewer. Had the court permitted a hearing the

defendant could have subpoenaed witnesses such as the paralegals involved in the expert retention process as well as all file documents, unredacted letters and emails, telephone messages and any similar materials to address the issue of when the expert had been retained. Rather than allowing a hearing to present such evidence, the trial court determined that the defendant had failed to obtain and present counter-evidence to the plaintiff's lawyer's affidavit, and based on that, the court rejected the request for a hearing.

The defendant presented the only facts it could which was that there was no objective evidence presented as to when the expert had been retained. The opinion letter attached to the opposition to the Motion to Dismiss was undated and was missing the signature of the author. Prior to a hearing to address the issue, the defendant had no other information to provide. It was improper for the trial court to hold the defendant to the standard of presenting evidence that it did not possess. The hearing should have been permitted to allow a challenge the plaintiff's evidence.

The trial court erred in denying the defendant an evidentiary hearing on its motion to dismiss. As a result, if this court does not find that permitting the amendment was untimely, the ruling on the motion to dismiss should be reversed and an evidentiary hearing on the motion should be held.

D. The Trial Court Erred When It Failed to Direct a Verdict Due to the Plaintiff's Failure to Present the Necessary Expert Testimony on Causation

1. Standard of Review

The trial court's determination as to whether expert testimony was necessary is a legal one subject to plenary review. See, e.g., Doe v. Hartford Roman Catholic Diocesan Corp., 317 Conn. 357, 373 (2015).

2. The Plaintiff's Expert Testimony Failed To Remove Causation From The Realm of Speculation

Judith Kissel failed to present expert testimony of a causal connection between Dr. Wang's alleged deviation from the standard of care and the cause of her alleged injuries. Specifically, she did not submit any expert evidence to allow the trier of fact to find that Dr. Wang's failure to perform an inspection of the subject lamp, directly prior to her treatment session, was the proximate cause and/or substantial factor in causing her alleged injuries.

To prevail in a medical malpractice action, the plaintiff must prove (1) the requisite standard of care for treatment, (2) a deviation from that standard of care, and (3) a causal connection between the deviation and the claimed injury." (Internal quotation marks omitted.) Gold v. Greenwich Hospital Assn., 262 Conn. 248, 254-55 (2002). Generally, the plaintiff must present expert testimony in support of a medical malpractice claim because the requirements for proper medical diagnosis and treatment are not within the common knowledge of laypersons. See, e.g., Doe v. Yale University, 252 Conn. 641, 686-87 (2000); Levett v. Etkind, 158 Conn. 567, 573-74 (1969).

Boone v. William Backus Hosp., 272 Conn. 551, 567 (2005).

Here, the plaintiff failed to remove from the realm of speculation the nature of the defect that would have been discovered had the inspection been carried out. This missing aspect of the plaintiff's case was compounded by the fact that there was no evidence as to why the lamp actually ended up coming into contact with the plaintiff's foot. Instead, all that was ever presented in the plaintiff's case in chief was speculation as to what had occurred. Given these persistent unknown facts regarding causation, it was improper to permit the jury to attribute the cause to some unspecified defect in the lamp that Dr. Wang was supposedly obligated to discover with an additional inspection. Because this was a professional negligence case the plaintiff was required to prove causation by expert testimony.

There was no evidence presented that a defect in the lamp actually existed on the date of the incident.⁶ Moreover, there was no evidence that if such a defect existed it was discernable on inspection by Dr. Wang. The plaintiff's case was instead premised on speculation at multiple levels. The defendant moved for, and should have been granted, a directed verdict because there was no expert testimony to prove causation presented in the plaintiff's case in chief. Moreover, the causation chain was actually broken more fundamentally due to the plaintiff's failure to remove from the realm of speculation what actually occurred in the room to cause the lamp to come into contact with the plaintiff's foot.

Simone Wan Moran, L.Ac. was the plaintiff's lone expert witness qualified under Conn. Gen. Stat. § 52-184c as a similar health care provider to offer standard of care testimony. She testified that with respect to the use of heat lamps, that the standard of care required checking the lamp between every patient. Her testimony was as follows:

Q: So with respect to the testing of the device that's required by the standard of care.

As an acupuncturist using a CQ-36 in 2010 you were required to check the tension on the device by moving the heads up and down and also to gently shake the device to see if the heads moved?

A: Yes. With this style lamp you need to check the tension for the articulating arm and then make sure when it moves -- or move it to check if it has the propensity to fall. In between every patient.

Tr. Dec. 12, 2017, pp. 105-106. A520.

Her testimony continued that a lamp inspection should occur between each patient:

⁶ It is important to distinguish between defects in the lamp that could be discerned by the user from the plaintiff's claim against the product manufacturer that the lamp had been defectively designed.

Q: [What does] the standard of care require with respect to pre-use testing of CQ-36 style lamp in practice?

A: To assess it between every patient.

Tr. Dec. 12, 2017, p. 133. A520.

Lastly, Ms. Wan testified as to what was required if the lamp failed an inspection.

Q: In the situation where [acupuncturist] do tests and the lamp fails the test, what does the standard of care require?

A: To not use it on a patient to take it out of service so that it would not cause harm.

Tr. Dec. 12, 2107, p. 107. A520.

Q: If Dr. Wang had done a test any time prior to plaintiff and the lamp failed, the standard of care required him to take it out of service?

A: Yes.

Tr. Dec. 12, 2017, p. 132. A520.

So, in order to be taken out of service, the lamp had to be tested and it had to have failed that testing. Ms. Wan Moran never testified that had a lamp inspection been performed by Dr. Wang immediately prior to Ms. Kissel's treatment session that it would have revealed some failure that would have warranted taking the lamp out of service. Instead, all that the plaintiff did was present a partial expert opinion concerning standard of care and breach and then left it to the jury to speculate and fill in the missing pieces of causation. Specifically, the jury was left to speculate about what Dr. Wang would have found on testing that would have been a defect that would have led to the lamp being removed from service. This was improper as the evidence was that the lamp had not "failed."

The plaintiff needs an expert opinion that will provide the entire causation analysis. The case of Bagley v. Adel Wiggins Grp., 327 Conn. 89 (2017) is instructive on the need for expert testimony on all elements in the chain of causation. The issue in Bagley was that the plaintiff had failed to present expert testimony that there was respirable asbestos that emanated when a particular object containing asbestos had been sanded. While the plaintiff did prove that the product contained asbestos, that it was sanded in the location where the plaintiff's decedent was working and that the plaintiff's decedent had contracted mesothelioma from exposure to an asbestos containing product, there was no expert testimony that the fibres were actually present in the air-borne particles. "Because the defendant did not concede (that respirable asbestos fibres were emitted when the product was sanded that the decedent could have inhaled) and it is not a matter of common knowledge of lay jurors, the plaintiff was required to prove it with competent expert testimony. Bagley at 108.

The same reasoning applies here. The jury needed competent expert testimony to describe what defect was present on the date of the incident that could have been discovered by Dr. Wang had he done the additional inspection that the plaintiff's expert claimed was required of him to meet the standard of care.⁷ The jury could not just speculate that he would have found something that would have led to the lamp being taken out of service. That would be wholly unfair to Dr. Wang. The plaintiff should not have been permitted to present a supposed obligation to do an additional inspection without showing that it would have revealed something that would have made a difference. This was

⁷ Dr. Wang inspected the lamp in the morning and no defect requiring it to be taken out of service was found. The plaintiff's expert's criticism was that he did not do additional inspections prior to seeing each patient.

particularly true in this case where the engineering experts, who examined the lamp in detail after the incident were unable to find a defect that caused it to lower. Professional engineer Popp's testimony was particularly telling when he said it was impossible for the lamp to fall without an outside influence:

Q: In your opinion, that scenario -- let me withdraw the question and I'll ask it again.

Would you agree that in your opinion, the scenario of the head of the lamp dropping onto Ms. Kissel's toe without outside influence is unlikely?

A: In my own opinion, I'd say impossible.

Popp, P.E., Tr. Dec. 1, 2017, p. 167. A518.

At the close of the plaintiff's case in chief, the defendant moved for a directed verdict on the issue that the plaintiff's expert testimony on causation was insufficient to remove the case from the realm of speculation. That motion was deferred by the court. The issue was raised again on the defendant's motion to set aside the verdict. A302. The court denied the motion to set aside the verdict. A431. In ruling on the directed verdict the court never truly analyzed the expert witness issue relative to a defect that could have been found with this lamp on the date of the incident. It looked instead to evidence which it did not specify that lamps of this type could fail over time. It ignored the key issue which was whether *this lamp* had a discernable defect that would have led to it being taken out of service on the day in question.

Evidence of this lamp actually failing due to a discernable defect was non-existent. None of the engineering experts found the lamp, left in an unperturbed state, would slowly lower. Instead, the conclusion was that the plaintiff herself must have contacted the lamp to make it fall. That, however, was never part of the standard of care equation. The

plaintiff's expert never said that Dr. Wang had to ascertain through testing that the lamp would not lower or fall suddenly when contacted. The only standard of care issue was to test it in between every patient. A520.

Through her expert, the plaintiff chose to make this case a very narrow standard of care case about testing the lamp between patients. After doing so, it then became incumbent upon her to show that had the testing she claimed was needed had been done, that some defect would have been apparent to Dr. Wang that would have caused him to take the lamp out of service. And this had to be presented through expert testimony. Lay conjecture or speculation by the jury, based only on the fact that the lamp ended up on the plaintiff's foot for unexplained reasons is not proof that the additional inspection would have revealed a defect that would have caused it to be taken out of service.

The trial court erred in failing to direct a verdict for the defendant. Because the plaintiff failed to meet her burden of proof, the trial court must be reversed and a directed verdict entered in favor of the defendants Dr. Wang and the Center.

E. The Jury Charge Was Erroneous on The Law

1. Standard of Review

The standard of review concerning claims of error in jury instructions is well settled. "[J]ury instructions are to be read as a whole, and instructions claimed to be improper are read in the context of the entire charge. . . . A jury charge is to be considered from the standpoint of its effect on the jury in guiding it to a correct verdict. . . . The test to determine if a jury charge is proper is whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Jury instructions need not be exhaustive, perfect or technically accurate, so long as they are correct in law,

adapted to the issues and sufficient for the guidance of the jury." (Internal quotation marks omitted.) Bovat v. Waterbury, 258 Conn. 574, 589-90, 783 A.2d 1001 (2001). "Our standard of review on this claim is whether it is reasonably probable that the jury was misled." (Internal quotation marks omitted.) Sevigny v. Dibble Hollow Condominium Ass'n., Inc., 76 Conn. App. 306, 311, 819 A.2d 844 (2003). Beckenstein v. Reid & Riege, P.C., 113 Conn. App. 428, 440-41, 967 A.2d 513, 520-21 (2009).

2. The Charge Likely Misled the Jury

Because the plaintiff failed to present expert testimony on causation as to Dr. Wang, the court ultimately altered the standard medical malpractice charge on causation to essentially allow the jury to eliminate the requirement for expert testimony. Based on the issue in the section above, the charge was in error since the jury should not have been permitted to determine causation without expert testimony. The Court charged as follows:

Finally, a plaintiff must establish that the breach of that standard of care was the proximate cause of the injuries that she claims - generally that requires expert testimony *unless the causative link is sufficiently obvious to a lay person that expert testimony is not required.* Tr. Dec. 19, 2017. A526.

Later in the charge it stated:

In order to recover from a defendant, plaintiff must prove that defendant's conduct was, in fact, a proximate cause of the injuries sustained by the plaintiff. With respect to the malpractice claim, the proof generally must be based on expert testimony, *unless the causative link can be discerned by a layperson without the need of expert assistance.* Tr. Dec. 20, 2017. A528.

While these issues were addressed at length at a charge conference, counsel for Dr. Wang and the Center took exception to the charge given by the court. (See transcript 12-20-17 at pages 39-41). A528.

The charge itself is an erroneous statement of the law applicable to this medical malpractice claim because it fails to require proof of causation by expert testimony. See,

Boone at 567. The facts here certainly did not permit the lay jury to speculate on their own that some defect was present in the lamp that Dr. Wang would have discovered had the additional inspections been performed between patient treatment sessions. That would never be appropriate.

"[T]o prevail in a medical malpractice action, the plaintiff must prove (1) the requisite standard of care for treatment, (2) a deviation from that standard of care, and (3) a causal connection between the deviation and the claimed injury. . . . [Id.], 254-55. Generally, the plaintiff must present expert testimony in support of a medical malpractice claim because the requirements for proper medical diagnosis and treatment are not within the common knowledge of laypersons. See, e.g., Doe v. Yale University, 252 Conn. 641, 686-87, 748 A.2d 834 (2000); Levett v. Etkind, [158 Conn. 567, 573-74, 265 A.2d 70 (1969)]. An exception to the general rule [requiring] expert medical opinion evidence . . . is when the medical condition is obvious or common in everyday life. . . . Similarly, expert opinion may not be necessary as to causation of an injury or illness if the plaintiff's evidence creates a probability so strong that a lay jury can form a reasonable belief. . . . Expert opinion may also be excused in those cases where the professional negligence is so gross as to be clear even to a lay person." (Internal quotation marks omitted.) Boone v. William W. Backus Hospital, supra, 272 Conn. 567." Dimmock v. Lawrence & Mem'l Hosp., Inc., 286 Conn. 789, 813, 945 A.2d 955, 969 (2008).

Based on the standard for medical malpractice cases, which this case was, the plaintiff needed a causation expert. While there may have been some level of similarity between the issues presented to the jury on the products liability case and the theory presented against Dr. Wang and the Center, they were still separate cases that had to be

proven to an appropriate standard. The jurors are not acupuncturists who inspect acupuncture lamps, nor are they engineers who inspect lamps for defects. The plaintiff's expert, Simone Wan-Moran, L.Ac. set up the standard of care requirement to inspect the lamp between patients. It was incumbent upon the plaintiff to tie that requirement to a cause of the damages. The plaintiff needed proof by expert testimony, just as in any malpractice case where the issue was an alleged failure to conform to the standard of care resulting in damages. The plaintiff was not permitted to make this acupuncture lamp inspection and the supposed defect to be found from it into a lay investigation based on speculation. Yet, that is exactly what the trial court allowed the jury to do with its instruction. This error actually started with trial court's failure to direct a verdict when the plaintiff's expert testimony was insufficient. It was then compounded in the charge when the court, apparently recognizing the lapse in the plaintiff's case, allowed the jury to ignore, if it saw fit the need to prove the case by expert testimony. There was no expert testimony on causation presented by the plaintiff in the medical negligence case. The trial court was not permitted to fix that gap in the plaintiff's case by allowing the jury, through its erroneous instruction, to eliminate the expert testimony requirement, if it wished.

Second, the charge leaves the issue of expert testimony open ended as to what the jury should do if in fact, as laypersons, they were not able to discern the causative link between the defendant's deviation from the standard of care and the plaintiff's alleged injuries. Initially, the language requires expert testimony, but then it leaves open the option for the jury to simply reject that requirement.

Here, the court should have required proof by expert testimony. The fact that the charge essentially left it up to the jury to decide whether or not it would require expert

testimony is a problem. Obviously, the jury did not have expert testimony on causation, but leaving it up to the jury to decide whether it is required makes no sense. That is not a decision the jury is permitted to make. If the court was going to allow causation to simply be a lay decision, then it should have done so. In the defendant's view that would have made the error in the charge more direct. But to leave the jury to decide what it needed to assess to decide the causation element was error because charging as to the standard for proving causation is a legal issue that is not within the realm of a lay jury to decide.

Because the charge was erroneous on the crucial issue of the plaintiff's need to prove causation by expert testimony, the defendant is entitled to a new trial.

III. Conclusion

The failure to attach an opinion letter to the complaint and the failure to establish causation through expert testimony are errors which warrant reversal with judgment directed for the Defendant. The instructional error requires a new trial, and the failure to provide an evidentiary hearing on the motion to dismiss requires a remand for such a hearing.

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that on July 19, 2019:

(1) The electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided;

(2) The electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law;

(3) A copy of the brief and appendix has been sent to each counsel of record in compliance with Practice Book § 62-7;

(4) The brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(5) The brief complies with all provisions of this rule.

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CERTIFICATION

I hereby certify that a copy of the defendant-appellant's brief with separately bound appendix, was mailed, first class postage prepaid, on July 19, 2019 to:

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